The City of New York

POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Matee Brisbane	:	ORDER
Tax Registry No. 933527	:	OF
Administrative Support Division	:	DISMISSAL

Police Officer Matee Brisbane, Tax Registry No. 933527, Shield No. 1254, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 2014-11430, as set forth on form P.D. 468-121, November 17, 2014, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Matee Brisbane from the Police Service of the City of New York.

WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE: ON MAY 22, 2015 AT 0001 HRS.

The City of New York

POLICE DEPARTMENT

April 14, 2015

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2014-11430
Police Officer Matee Brisbane	:	
Tax Registry No. 933527	:	
Administrative Support Division	:	

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Amy J. Porter
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Javier Seymore, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Stuart London, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, NY 10038

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on October 21, 2014, November 17, 2014, January 6, 2015 and January 8, 2015, charged with the following:

1. Said Police Officer Matee Brisbane, on or about and between October 18, 2013, and February 18, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer Brisbane wrongfully did ingest marijuana without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Said Police Officer Matee Brisbane, on or about and between October 18, 2013, and February 18, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer Brisbane wrongfully did possess marijuana without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIIONS

The Department was represented by Javier Seymore, Esq., Department Advocate's Office, and Respondent was represented by Stuart London, Esq., Worth Longworth & London, LLP.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of both Specifications.

SUMMARY OF EVIDENCE PRESENTED

Background

The following facts are undisputed. Respondent was screened for drugs on October 18, 2013. Laboratory analysis on his leg hair came back with negative results. On February 18, 2014, he was randomly selected to undergo drug screening again. Police Officer Jerome Keeley at the Medical Division collected three samples, taking a combination of leg and chest hair from Respondent. Two of the samples were sent to Psychemedics Corporation (Psychemedics), a drug testing laboratory in California. As per Department policy, the third sample was stored at the Medical Division so that, in the event that the first two samples tested positive, Respondent could send the third sample to a lab of his choosing for independent testing. Psychemedics notified the Department that Respondent's samples tested positive for marijuana. Respondent sent his third sample to Quest Diagnostics (Quest). It also came back positive for marijuana.

Respondent, a 12-year member of the Department, denied ever ingesting marijuana while employed as a police officer. On March 12, 2014, after learning of the positive test results, Respondent went to a Manhattan testing facility named Peace of Mind Testing, where he submitted a sample of head hair. The sample, which ended up being testing by Psychemedics, came back negative.

The February Hair Sample Collection

Keeley has worked for the Medical Division's Drug Screening Unit for about three years. On February 18, 2014, Respondent signed in at the Medical Division and

filled out a Drug Screening Questionnaire [Department's Exhibit (DX) 4], on which he noted any prescription medications he had recently taken.

According to Keeley, once inside the collecting room, he washed the table with alcohol and then covered it with paper. With gloved hands, he used a new razor to shave Respondent's hair from his leg and chest onto the paper. In Respondent's presence, he then separated the hair into three samples of approximately 100 strands each. Each of the samples was placed into an interior envelope and exterior plastic pouch. Respondent initialed the envelopes. Keeley indicated that he placed with each sample a custody and control form, on which Respondent was identified by a unique donor identification number. Respondent signed these forms to certify that the samples were his. Keeley sealed the pouches and secured them in a locker.

Keeley had no independent recollection of his interaction with Respondent. Keeley received training that it was preferable to take samples from the head. Body hair is taken usually when head hair is fake, too short, or in bad condition. Keeley knows that hair is fake only when the donor tells him. Keeley would not unilaterally make a decision to take body hair just because a donor has dreadlocks like Respondent's. When asked why he did not take Respondent's samples from the head, he testified that for some reason he must have believed that a good head hair sample was not possible. Looking at Respondent's hair at trial (on January 6, 2015), Keeley did not notice any condition that would inhibit him from taking a head hair sample.

Respondent testified that his head hair was longer and thicker on February 18, 2014 than it was at trial. Nevertheless, according to Respondent, Keeley told him at the time of collection, "You don't look like you want me to take it from your head."

Respondent replied, "No, not if you don't have to." Keeley proceeded to shave Respondent's leg. Because the October 2013 test had left Respondent's leg hair shorter than usual, Keeley needed to take some chest hair also.

The Psychemedics and Quest Results

Thomas Cairns is the senior scientific advisor and deputy lab director at Psychemedics. This is a salaried position. Psychemedics has been cleared by the Food and Drug Administration for its testing methods for marijuana, and it is licensed by the New York State Department of Health in forensic toxicology with a particular emphasis on drug testing with hair. Cairns was deemed an expert in that field.

Cairns explained that marijuana is a mixture of cannabinoid compounds, which, when ingested into the body, enters the bloodstream. When passed through the liver, marijuana is metabolized into carboxy tetrahydrocannabinol (THC). As THC-contaminated blood enters the base of a strand of hair, the metabolite becomes trapped inside the hair structure. Because hair grows at a predictable rate, it acts as a "tape recorder" of drug ingestion. A body hair sample, shaved at the skin, would contain hairs of varying lengths.

The first test that Psychemedics conducts on a sample is enzyme immunoassay (EIA). If this analysis finds a presence of cannabinoids at a concentration above the administrative cutoff level of 10 picograms per 10 milligrams of hair (10pg/10mg), it is considered presumptive positive. Cairns explained that the administrative cutoff level is used to clearly differentiate a drug user from someone who has been subjected to passive marijuana exposure. In presumptive positive cases, another portion of the same sample is

aggressively washed to remove external contamination and sent for mass spectrometry (MS). If MS finds a presence of THC above the cutoff level of 1pg/10mg, the lab will test a second sample for confirmation. Only in cases where both the first and second samples test positive does Psychemedics report a positive finding to the Department.

At trial, Cairns reviewed the laboratory data package [DX 1] produced by Psychemedics for the samples collected from Respondent on February 18. The package, in which Respondent was identified by his donor identification number, showed that the chain of custody remained intact. Respondent's first sample came back from MS with a result of 1.8pg/10mg. The second sample came back with a result of 3.7pg/10mg. According to Cairns, the concentrations of THC found in Respondent's hair signified recreational use of marijuana.

A review of the Quest data package [DX 2] for Respondent's third sample showed that MS analysis on the sample came back with a positive result for THC at a concentration of 4.0pg/10mg. Again, the chain of custody remained intact throughout the process. Cairns described the Quest result as being in "synchronous harmony" with the two Psychemedics results. The results signified multiple ingestions of marijuana over the six-to-seven-month look back period represented by the body hair samples.

Cairns agreed that Psychemedics prefers head hair samples over body hair samples, as the probative interpretation of head hair is easier to understand. Sample collectors are trained by Psychemedics that samples should be collected from the head when feasible. Cairns did not know why body hair samples were taken from Respondent at the Medical Division.

FINDINGS AND ANALYSIS

Respondent stands charged with wrongfully ingesting and possessing marijuana without police necessity or authority to do so. Respondent attempted to discredit the positive test results in several ways.

Environmental Contamination

First, Respondent offered environmental contamination as an explanation for the positive results. He testified that because of a mold problem in his apartment, he and his family were staying at his mother's apartment in January 2014. His aunt, cousin, and her children were also staying in the apartment, which had just two bedrooms. He was aware that his aunt, cousin, and wife smoked marijuana in the bathroom. Though none of his relatives smoked in front of him, he would smell marijuana upon entering the bathroom. This occurred on a daily basis in January and the weeks in February prior to the drug test.

In support of his theory, Respondent referred to a Massachusetts Civil Service Commission hearing in which some Psychemedics lab results for Boston police officers were rejected. In Cairns' opinion, the judge in that case misinterpreted the science and lacked understanding of environmental contamination. There was also a 2013 Wisconsin Civil Service Commission decision in which a judge indicated skepticism of Psychemedics' claim that laboratory washing protocols would entirely remove externally-applied cocaine. Similarly, there was an Indiana case that resulted in a police officer being reinstated after a judge decided that external contamination could not be

ruled out. Respondent entered as Court Exhibit (CX) 1 further information about these cases.[1]

Despite these rulings, Cairns remained confident that after undergoing the washing techniques employed by Psychemedics, environmental exposure to marijuana could not cause a positive test result. This is because THC is a unique human metabolite that is created only after actual ingestion, and because the administrative cutoff level weeds out actual marijuana users from people who may have experienced passive inhalation via secondhand smoke.

Cairns' testimony is supported by an article published in *The Journal of Analytical Toxicology* in August 2014. The article [DX 3], entitled, "Analysis of Extensively Washed Hair From Cocaine Users and Drug Chemists to Establish New Reporting Criteria," found that "the implementation of extensively washing hair . . . along with the detection of pertinent metabolites can be used to differentiate passive exposure to cocaine from active use of cocaine." Cairns' testimony is further supported by the fact that, as mentioned above, Psychemedics' testing methods have passed both federal and state review. As for the decisions discussed in CX 1, all of those cases dealt with testing for cocaine, not marijuana. While a handful of judges in other jurisdictions determined that Psychemedics' results may have been impacted by environmental contamination, those cases are not controlling before this tribunal. In any event, Respondent failed to demonstrate that such contamination did cause a false positive in his own lab results.

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[1] *In re Boston Police Department Drug Testing Appeals*, MA Civil Serv. Comm'n, Case Nos. D-01-1409 et al. (Feb. 28, 2013); *Brandt v. Scot Forge Co.*, WI Labor & Indust. Review Comm'n, UI Hearing No. 09006150MD (Jul. 18, 2013); *Rodriguez v. Scot Forge Co.*, WI Labor & Indust. Review Comm'n, UI Hearing No. 11004435MD (Jul. 31, 2013).

The Disparity Between the Three February Sample Results

Next, Respondent argued that the disparity in the lab results showed that the testing was unreliable. As mentioned above, the MS analysis conducted on the first sample found a concentration of THC at a level of 1.8pg/10mg. The second sample had a concentration of 3.7. The third sample the one tested at Quest – had a concentration of 4.0. However, as Cairns explained, these disparities did not demonstrate that the tests are unreliable.

The results for the second and third samples were quite close. They would not be perfectly identical since body hair samples contain hairs of varying lengths, and because the two samples were tested at different labs using different methods.

As for the first sample, Cairns explained its deviation from the other samples. The deviation was the result of the sample containing shorter strands of hair. Consequently, the sample had a shorter look back period.

The Negative October and March Results

Respondent argued that because his October and March tests were negative, the positive February test could not be trusted as accurate. This argument is not persuasive because the October, February, and March samples represented different look back periods and were, thus, consistent with one another.

The data package [Respondent's Exhibit A] for the head hair sample that Respondent submitted on his own in March showed that while IA analysis came back with negative results for all drugs, there was indication of cannabinoid presence at a

concentration below the cutoff level. Cairns testified that this result was possibly consistent with passive inhalation, but because the sample did not undergo MS analysis one could only speculate. Another possible explanation for the result was what Cairns called an "avoidance tactic." He explained that because the sample of head hair was one-inch long, it represented a look back period of just 60 days. Thus, by abstaining from marijuana during the 22 days between the February 18 and March 12 collection dates, Respondent could have brought the concentration of the cannabinoids in his head hair sample down to below the cutoff level. Cairns was aware of dozens of cases where defendants facing positive drug test results have resorted to this tactic.

Similarly, Respondent's October sample may have also contained cannabinoids at a level below the administrative cutoff. Because of the policy regarding the reporting of negative tests to the Department, however, no data package was produced for that sample.

In conclusion, due to the different look back periods and use of the administrative cutoff level, the negative October and March tests did not invalidate the positive February test. All three tests are reconcilable with one another.

Body Hair Instead of Head Hair

Psychemedics trains collectors to take hair samples from the head whenever feasible. Keeley could not identify any reason for his decision to collect from the body instead of the head. Even if Keeley's collection of Respondent's samples strayed from

normal practice, the fact that body hair was taken instead of head hair did not nullify the test results.

Respondent never challenged the fact that the samples collected on February 18, 2014 were collected from his person. Nor did he credibly challenge the integrity of the sample collection procedure, laboratory methods or instrumentation, or chain of custody along any point in the process.

Based on the foregoing, the Court accepts the positive test results as proof that Respondent ingested and, thus, possessed marijuana during the look back period. Accordingly, he is found Guilty of these Specifications.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 3, 2003. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of possessing and ingesting marijuana without police necessity or authority. The Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana. Accordingly, the Court recommends that the Respondent be DISMISSED from the New York City Police Department. *See Disciplinary Case No. 85554/09*, signed January 5, 2011 (16-year member with no prior disciplinary record was dismissed from the Department for possessing and ingesting marijuana. The Court rejected Respondent's argument that he

may have used marijuana during alcohol-induced blackouts), *See Disciplinary Case No. 81455/05*, signed August 3, 2007 (23-year member was terminated from the Department for possessing and ingesting marijuana), confirmed sub nom. *Matter of Chiofalo v. Kelly*, 70 A.D.3d 423 (1st Dept. 2010); *but see Matter of McDougall v. Scoppetta*, 76 A.D.3d 338, 905 N.Y.S.2d 262 (2d Dept. 2010).

Respectfully submitted,

Amy J. Porter
Assistant Deputy Commissioner – Trials

APPROVED

MAY 22 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MATEE BRISBANE
TAX REGISTRY NO. 933527
DISCIPLINARY CASE NO. 2014-11430

Respondent received an overall rating of 4.0 "Highly Competent" on his last three annual performance evaluations. [redacted] He has no prior formal disciplinary record.

For your consideration.

Amy J. Porter
Assistant Deputy Commissioner – Trials